Supreme Court, U.S.
FILED
NOV 25 1991
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(2)

No. 91-596

In The

Supreme Court of the United States

October Term, 1991

WAYNE ESTELLE,

Petitioner,

v.

DENNIS ROSA COLLAZO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state court's determination that a confession was not the product of a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or other coercive police activity, is a finding of fact which is entitled to a presumption of correctness under 28 U.S.C. § 2254(d)

2. Whether a state court's determination that a defendant validly waived his rights under *Miranda v. Arizona* is a finding of fact which is entitled to a presumption of correctness on federal habeas corpus.

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BRIEF IN OPPOSITION

The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed July 18, 1991 following rehearing en banc, be denied.

OPINION BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit is fully reported at 940 F.2d 411. Petitioner's reproduction of the en banc opinion at

Pet. App. A, pp. 43-44 is incomplete; a portion of the dissent has been omitted.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 18, 1991. The petition for a writ of certiorari was filed on September 27, 1991 and docketed on October 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTE INVOLVED

Title 28 U.S.C. § 2254(d).

STATEMENT

For purposes of this Brief and with the following exceptions, respondent adopts the statements of fact summarized by the Court of Appeals in *Collazo v. Estelle*, 940 F.2d at 413-414 and the California Court of Appeal, First Appellate District, Division Four (Pet. App. D, at pp. 78-82.).

Respondent, a Drug Enforcement Administration (DEA) confidential operator working in California, Texas, New York, and Mexico, was not present when the drug dealer was shot and killed in this case. During the brawl, to which the Court of Appeals referred in its opinion, and prior to the killing, *Collazo*, 940 F.2d at 413, respondent fled from the drug dealer's home and drove away in his

car. The person who accompanied respondent to the drug dealer's home, with whom respondent had been previously unacquainted, continued the fight. Only after respondent had driven away was the drug dealer shot and killed. Respondent was convicted in violation of Cal. Penal Code, § 187 by virtue of the California felony-murder rule even though he was not present at the time of the killing. There was no evidence that respondent knew that the victim would be killed, intended to kill the victim, or possessed the requisite mental states of malice aforethought and premeditation and deliberation otherwise required to sustain a first degree murder conviction pursuant to Cal. Penal Code, § 187.

ARGUMENT

1. The principal contention of the petitioner in this Court – whether a state court's determination that a confession was not the product of a violation of *Miranda v. Arizona*, 386 U.S. (1966), or other coercive police activity, is a finding of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d) – was neither raised at any of the proceedings below, briefed by the parties, nor considered by the Court of Appeals for the Ninth Circuit at any stage of the proceedings.

2. In its en banc opinion, the Court of Appeals for the Ninth Circuit states that California (petitioner) argues that factual findings, *"insofar as they pertain to the validity of the alleged waiver,* are entitled to the presumption of correctness mandated by 28 U.S.C. § 2254(d)." *Collazo v. Estelle*, 940 F.2d 411, 414-415 [footnote omitted and

emphasis added]. At all times, petitioner asserted only that the validity of the waiver – not the validity of the confession as raised in the petition for writ of certiorari – was entitled to a presumption of correctness.

3. While purporting not to challenge the holding of *Miller v. Fenton*, 474 U.S. 104 (1985), (see Pet., at p. 14), petitioner actually seeks its demise. During the proceedings below, the petitioner took the opposite position in respect to the principal contention, either conceding or acknowledging that a determination as to the validity of a confession is a legal question.

For example, in the Supplemental Brief filed by petitioner in the Court of Appeals for the Ninth Circuit, dated August 31, 1990, petitioner, citing with apparent approval, inter alia, *Miller v. Fenton*, 474 U.S. 104, stated: "We acknowledge that the ultimate issue of the voluntariness of a confession is a *legal* question requiring independent federal determination." (Emphasis in original.) Thus, not only did petitioner not raise the principal contention at any time in proceedings below but consistently conceded that voluntariness of a confession is a legal and not a factual question – a position completely at variance with petitioner's newly-advanced argument in this Court.

The petitioner should not now be permitted to inject a newly advanced contention or belated theory for the first time here in this Court. *Giordenello v. United States*, 357 U.S. 480, 488 (1958).

4. The second contention raised and analyzed by the petitioner – whether a waiver of rights under *Miranda* is a finding of fact also entitled to a presumption of correctness – is also flawed. The petitioner notes correctly

that the Court of Appeals for the Ninth Circuit treated the validity of a *Miranda waiver* as a mixed question of law and fact. (See Pet., at p. 14, second full paragraph; Pet., at p. 20; see also *Terravona v. Kincheloe*, 852 F.2d 424 (9th Cir. 1988), and *Ahmad v. Redman*, 782 F.2d 409 (3d Cir. 1986) (voluntariness of a waiver is mixed question of law and fact).) Immediately thereafter, the petitioner argues that "it is inappropriate to treat the waiver of *Miranda* rights as a question of law" (*Id.*) The Court of Appeals clearly did not do so, as petitioner incorrectly asserts.

Relying on *Miller v. Fenton*, the Court of Appeals held rather that voluntariness of a waiver is a mixed question of law and fact, requiring de novo review. *Collazo v. Estelle*, 940 F.2d at 415-416; see also *Derrick v. Peterson*, 924 F.2d 813, 821-822 (9th Cir. 1990). Petitioner also fails to mention that in this case the Court of Appeals held that in respect to the awareness prong of the waiver question, in the context of collateral review, a state court's determination that a defendant knowingly and intelligently waived his *Miranda* rights is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). *Collazo v. Estelle*, 940 F.2d at 416, quoting *Derrick v. Peterson*, 924 F.2d at 823.

5. Moreover, in the state court proceedings, the trial court made no findings – factual or legal – with respect to the issue of waiver. The trial court rather focused on the question of voluntariness which petitioner concedes properly remains a mixed question of law and fact. (See *Collazo v. Estelle, supra*, 940 F.2d at p. 415, fn. 3.)

The California Court of Appeal sustained the trial court's ruling, focusing as well on the issue of voluntariness and not on the issue of waiver. (See Pet. App., at pp.

85-86.) Voluntariness was analyzed by the California appellate court as a function of both law and fact. (See Pet. App., at p. 87.) While federal habeas courts are required by virtue of 28 U.S.C. § 2254(d)(8) and this Court's holding in *Wainwright v. Goode*, 464 U.S. 78 (1983) to give considerable deference to factual determinations made by *any* state court, (as stated in *Parker v. Dugger*, 498 U.S. ___, 112 L.Ed.2d 812, 828, 111 S.Ct. 731 (dissent)), the factual determination to which petitioner would have the federal courts defer was not made by the state courts in this case. Their conclusions were perceived to involve and were consistently analyzed in terms of law and fact which may properly be reviewed by federal courts. (*Sumner v. Mata*, 455 U.S. 591, 597 (1982). Waiver as a distinct factual issue was not addressed by any California state court in this case.

6. The fundamental question at issue in the proceedings below involved the legal impact of police coercion that was conceded by the petitioner to be constitutionally improper. While consistently acknowledging that the police conduct in this case was "constitutionally improper," (see, e.g., Pet., at p. 13; and *Collazo v. Estelle*, 940 F.2d at 418 ("California freely admits on appeal '[t]he police violated Collazo's Miranda rights.' ")), petitioner has consistently failed to address the impact of this coercion on the issue of voluntariness.

When analyzed, petitioner's arguments boil down to a mixed question of law and fact: whether the "finding of coercion, which the Court may review de novo, is patently erroneous." (Pet., at p. 22.) This is a far cry from a presumption of correctness upon which the petition for certiorari has been otherwise ostensibly predicated.

In this vein, the concurring opinion by Circuit Judge Kozinski is most apposite: "[T]he Supreme Court has told us that voluntariness is not merely fact-bound question whether this particular suspect's confession is the product of coercion, but also a legal question about whether the techniques the police used were tolerable." *Collazo v. Estelle, supra,* 940 F.2d at 426.

Attempting to cast its argument in factual terms, the petitioner would have federal courts defer to state courts in the protection of federal constitutional rights in cases involving mixed questions of law and fact. Deference is not abdication. As this Court previously observed in *Miller v. Fenton,* 474 U.S. at 117, a state-court judge is in no better position than a federal habeas court to make a legal characterization of facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: November 25, 1991.

Respectfully submitted,

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